Supreme Court, U.S.
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No. 85-2066

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN DOYLE, BARBARA McCUEN, FRANK MISIANO, KEVIN SWEENEY, GEORGE LYNN, and JOHN CONSIDINE,

Petitioners,

vs.

SUFFOLK COUNTY, SUFFOLK COUNTY CIVIL SERVICE COMMISSION, and SUFFOLK COUNTY POLICE DEPARTMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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ARGUMENT

THE PETITION RAISES NO ISSUE MERITING REVIEW BY THIS COURT

Each of the petitioners was disqualified, pursuant to New York Civil Service Law §58(1)(a), from eligibility for appointment as a Suffolk County police officer. Section 58(1)(a) sets an eligibility age limit of 29 for such an appointment and each of the petitioners was, at the time of his or her disqualification, between 29 and 39 years of age. See appendix to the petition ("pet. app.") 6a. Petitioners seek review of a judgment of the United States Court of Appeals for the Second Circuit which affirmed the dismissal of their complaint by the United States District Court for the

Eastern District of New York for failure to state a claim upon which relief can be granted. Pet. app. 1a, 9a, 1b. The complaint alleged that section 58(1)(a) violates petitioners' equal protection rights under the Fourteenth Amendment to the United States Constitution. Pet. app. 4a.

The petition should be denied because the case presents neither a conflict with a decision of another federal court of appeals (or a state court of last resort) nor an important question of federal law which should be settled by this Court. See Sup. Ct. R. 17. Rather, petitioners merely repeat the arguments which they unsuccessfully made before the court of appeals.

Thus, petitioners first argue that the district court was required to afford them the opportunity of presenting evidence in support of their claim and that the dismissal of the complaint was, therefore, improper. Petitioners, however, ignore the fact that this Court has frequently upheld similar dismissals of equal protection claims where, as here, the applicable legal standard requires only that the statute be rationally related to a legitimate state interest. *See, e.g., Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 66 (1978); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). Indeed, in *Clover Leaf Creamery*, this Court specifically noted that even though parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, "they cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable' " [citation omitted]. 449 U.S. at 464 n.8.

Here, the district court was undoubtedly aware of the expert testimony which the State had presented, in opposition to a previous constitutional challenge to section 58(1)(a), showing that the mental and physical capabilities of police officers tend to decline after age 29. *Hahn v. City of Buffalo*, 596 F. Supp. 939, 944 (W.D.N.Y. 1984), *aff'd*, 770 F.2d 12 (2d Cir. 1985). Moreover, the district court clearly took judicial notice of the "commonsense proposition that aging — almost by definition — inevitably

wears us all down." *Vance v. Bradley*, 440 U.S. 93, 112 (1979). Accordingly, the court properly concluded that irrespective of whatever proof plaintiffs might submit, it had already been irrefutably established that the factual basis for the statutory age classification is, at the very least, rationally related to the State's interest in fielding the most physically capable police force possible.

Petitioners also argue that the continued application of section 58(1)(a) to those individuals who are between 29 and 39 years of age is irrational in view of the court of appeals' invalidation of the statute vis-a-vis those 40 years or older. *See Hahn*, 770 F.2d at 12 (the court, finding that the statute violates the Federal Age Discrimination in Employment Act, prohibited its enforcement as to those covered by the Act, i.e., 40 to 70 year-olds). In making what is essentially an argument against the severability of the statute, the petitioners do not challenge the court of appeals' conclusion that the New York Legislature would likely have wished that the statute remain effective as to those not covered by the *Hahn* decision. Instead, petitioners assert that the court of appeals failed to examine the constitutionality of applying the statute only to those who are between 29 and 39 years old. This assertion, however, is incorrect. The court of appeals considered the rationality of severing the statute and concluded that it would be reasonable for the New York Legislature to continue to pursue a policy, to the fullest extent permitted by federal law, of not hiring police officers beyond age 29. Pet. app. 15b-16b. Obviously, excluding all those in their thirties would go a very long way toward achieving the statute's principal objective of fielding the most physically capable and active police force possible.

Therefore, the petition for a writ of certiorari should be denied.

Dated: New York, New York
July 31, 1986

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